

## Comments to the Antitrust Modernization Commission

**From Attorneys General Representing the States of Hawaii, Oregon, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, the Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin**

**July 20, 2006**

The undersigned Attorneys General submit these comments in response to the Commission's Request for Comments on four Civil Remedies proposals.

### SUMMARY OF POSITION

The Commission's Request For Public Comment relating to civil remedies asked for comments on the following matters:

1. A proposal to reform indirect purchaser litigation;
2. A proposal to limit the circumstances in which treble damages are awarded to successful antitrust plaintiffs;
3. Whether the Commission should recommend to Congress that courts be permitted to assess more than treble damages; and
4. A proposal to change the current regime regarding private antitrust actions.

We support the proposal to reform indirect purchaser litigation by legislatively overruling *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). We oppose:

- (i) Legislation that would overrule *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968);
- (ii) Any initiative to preempt state *Illinois Brick* repealer laws; and
- (iii) Any proposal to remove to federal court any state indirect purchaser actions brought by state Attorneys General.

We generally support the proposal to require the use of structured proceedings, but express several concerns with the implementation of the proposal. We oppose the proposals to limit or increase treble damages. Finally, we oppose the proposal to place compensation for victims of antitrust violations within criminal antitrust proceedings.

## **DISCUSSION**

### **1. The Proposal To Reform Indirect Purchaser Litigation.**

The Commission is evaluating a proposal to reform indirect purchaser litigation that would consist of three principal components:

(1) Legislative overruling of (a) *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), so that indirect purchaser claims could be brought under federal antitrust law, and (b) *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), so as to allow assertion of the pass-on defense;

(2) Statutory provisions either (a) to allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III, or (b) to preempt state indirect purchaser laws; and

(3) Statutory provisions to allow the consolidation of all related direct and indirect purchaser actions in a single federal district court for pre-trial and trial proceedings.

#### **a. *Illinois Brick and Hanover Shoe***

As we have previously conveyed in great detail,<sup>1</sup> we support legislatively overruling *Illinois Brick* because the current federal system perpetrates an injustice to injured downstream purchasers by nullifying most consumer antitrust damage claims.

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<sup>1</sup> Testimony of Mark J. Bennett and Ellen S. Cooper Concerning Indirect Purchaser Actions Before the Antitrust Modernization Commission, submitted June 17, 2005, available at [http://amc.gov/commission\\_hearings/pdf/Bennett\\_Cooper.pdf](http://amc.gov/commission_hearings/pdf/Bennett_Cooper.pdf) (hereinafter “Testimony of Mark J. Bennett and Ellen S. Cooper”). That testimony attached the unanimous resolution of the National Association of Attorneys General in March 2005, which discussed indirect purchaser issues.

*Illinois Brick* significantly weakens the federal *parens patriae* authority given to the Attorneys General in section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>2</sup> As a result, the decision adversely affects the core mission of the state Attorneys General to protect consumers and government agencies. Concerns over a theoretical risk of multiple liability and procedural efficiency should not be used to deny injured persons an opportunity to seek redress, fairness, and justice, nor thwart the state Attorneys General in carrying out their mission.

As for the proposal to legislatively overrule *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), we instead recommend that the decision be legislatively modified to permit a fair allocation of damages among direct and indirect purchasers when there are multiple levels of claimants.

As the Commission is aware, *Hanover Shoe* stands for the proposition that antitrust defendants may not argue pass-on as a defense to liability or damages.<sup>3</sup> This holding is based in part on the concern that courts are unsuited to allocate damages among direct and indirect purchasers.<sup>4</sup>

Optimally, the touchstone of a federal antitrust damage claim should be actual damages. When anticompetitive activity injures persons at multiple levels of the chain of distribution and those persons sue, a defendant's treble damage exposure should be allocated among direct and downstream purchasers commensurate with actual damages sustained. The practical means of

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<sup>2</sup> See S. Rep. No. 95-9345, 95th Cong. 2d Sess. 16-17 (1978) (*Illinois Brick* decision a "virtual nullification of *parens patriae*").

<sup>3</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

<sup>4</sup> *Id.*

allocating damages used in many other causes of action can be applied to assess antitrust damages when necessary.

Yet if only a single level of purchasers, whether direct or downstream, files suit, *Hanover Shoe*, and its rejection of the pass-on defense, promotes optimal enforcement by deterring antitrust violations. Deterring wrong-doing and compensating victims should trump concerns about a theoretical risk of multiple liability. Thus, we do not recommend outright legislative repeal of *Hanover Shoe*.

**b. The Proposal To Allow Removal Of All State Indirect Purchaser Actions Or Preempt State Indirect Purchaser Laws.**

The proposal to reform indirect purchaser litigation includes a provision to: (a) preempt state indirect purchaser laws, or (b) allow for removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III. We oppose both prongs of this proposal.

**(1) Preemption of State Indirect Purchaser Laws.**

The state Attorneys General unanimously oppose preemption of state antitrust laws, including the preemption of state *Illinois Brick* repealers, for a number of reasons.<sup>5</sup>

First, preemption of state laws intrudes on the sovereignty of the states, and this “erosion of state sovereignty is inimical to the basic principles of federalism that inhere in our Constitution.”<sup>6</sup> We therefore oppose “federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such

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<sup>5</sup> National Association of Attorneys General Resolution, Principles of State Antitrust Enforcement, March, 2005 (“NAAG Resolution”). This resolution was previously submitted to Commission. See note 1 *supra*.

<sup>6</sup> *Id.*

preemption or limitation would impair enforcement of the antitrust laws, harm consumers, and harm free competition.”<sup>7</sup>

Second, many states have developed a legislative or judicial solution to address the problems created by *Illinois Brick*. Without succumbing to the insurmountable complexities forecast by the Supreme Court back in 1977, these state alternatives offer an array of models for Congress today. Some of these state remedies for downstream purchasers rest upon judicial constructions of the state antitrust act; some remedies, like restitution and disgorgement, are equitable, while others do not even sound in antitrust. Many states recognize price-fixing and other antitrust violations as violations of their consumer protection laws or Unfair and Deceptive Trade Practices Acts (Little FTC Acts). Preemption of these non-antitrust laws would be inappropriate and almost certainly would have broad, unintended consequences in other areas of law.

Third, preemption of state law would interfere with traditional state functions and with the core mission of the state Attorneys General to protect consumers and government agencies. As the chief law enforcement officers of their states, the Attorneys General are the primary enforcers of their states’ antitrust laws, and represent the consumers within their states, either as *parens patriae* or as its functional equivalent under state law.<sup>8</sup> The Attorneys General also bring proprietary actions on behalf of governmental entities to recover overcharges either in state or federal court.<sup>9</sup> The States’ ability to seek relief on behalf of citizens injured by violations of

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<sup>7</sup> *Id.*

<sup>8</sup> On state antitrust enforcement authority, see generally ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook* (2003); ABA Section of Antitrust Law, *Monograph No. 15, Antitrust Federalism: The Role of State Law* (1988).

<sup>9</sup> A state, as well as its political subdivisions, is a “person” entitled to secure relief under the federal antitrust laws. *Georgia v. Evans*, 316 U.S. 159 (1942); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

state law should not be abridged, and their right to do so, which is often codified in state constitutions and laws or which has accrued by reason of common law, should not be preempted.

Fourth, because approximately 75% of all purchases by local governments and state agencies are made through “indirect” distribution channels,<sup>10</sup> the availability of state *Illinois Brick* repealers for damages actions is important for and has a significant impact on state coffers.

Fifth, a meaningful federal remedy will encourage downstream purchasers to pursue their claims in federal court. Plaintiffs can aggregate all claims, both federal and state, in the federal court and achieve the efficiencies necessary for more effective prosecution of claims, including efficiencies in discovery, expert testimony, trial, and settlement negotiations.<sup>11</sup> A meaningful federal remedy would also lead to recoveries that are not dependent on the state in which the claimant resides, especially in negotiated settlements. That would promote efficient claims administration as well as reducing consumer confusion; defendants are also more likely to secure a global resolution of liability and damages. Moreover, because many state claims are interpreted with some degree of deference to federal law, the existence of an effective federal remedy for downstream purchasers will ultimately moderate differences among state laws. Conversely, if the federal remedy for downstream purchasers is inadequate to compensate consumers’ damages, state remedies must remain available.

Federal preemption of state remedies may make the system of antitrust enforcement less complex, but only at the expense of harming our federal system, which is fundamental to our national structure. Our federal system deserves respect for functional as well as constitutional reasons. State and federal enforcers play different roles that can only complement each other as

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<sup>10</sup> NAAG Resolution, note 1, *supra*.

<sup>11</sup> See O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15-SUM Antitrust 34 (2001).

intended if the integrity of each role is preserved. For these reasons, the Attorneys General unanimously oppose preemption of state antitrust law or other state provisions that allow recovery for downstream purchasers.

**(2) Removal Of All State Indirect Purchaser Actions To Federal Court.**

The proposal relating to the removal of all state indirect purchaser actions to federal court is tied to the following sub-issue in the Request For Comments:

Is a provision that would allow removal of state indirect purchaser actions necessary or desirable, in light of the generally applicable removal provisions contained in the Class Action Fairness Act?

Conceptually, the Class Action Fairness Act of 2005 (CAFA)<sup>12</sup> should remove to federal court a large number of *private* state court cases, i.e., actions not brought by the state Attorneys General.<sup>13</sup> Since CAFA permits aggregating the amount in controversy and relaxes diversity standards, more downstream purchaser cases are likely to qualify for removal. In cases with national or international corporate defendants, federal courts will likely have at least discretionary jurisdiction.

Under CAFA, a state court downstream purchaser action is likely to be removed to federal court and consolidated with a pending direct purchaser action asserting the same or similar factual allegations. Before recommending amendments to the recently enacted CAFA, the Commission should give cases removed under CAFA an opportunity to play out in the district and appellate courts. Judicial interpretations of CAFA as enacted should provide valuable insight into whether an exception from CAFA is appropriate for this single subset of

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<sup>12</sup> Pub. L. 109-2, Feb. 18, 2005, 119 Stat. 4.

<sup>13</sup> The discussion in the text is limited to removal issues, not consolidation issues. Under 28 U.S.C. § 1407(h), *parens patriae* actions brought by states under federal antitrust law may be consolidated and transferred by the MDL Panel “for both pretrial purposes and for trial.”

antitrust cases. For efficient case management, the Supreme Court's ruling in *Lexecon*<sup>14</sup> should be legislatively reversed so that cases, once removed, can be tried together.<sup>15</sup>

When state Attorneys General bring *parens patriae* actions in state court, however, for the reasons asserted in testimony submitted earlier,<sup>16</sup> CAFA does not apply and these actions are not removable to federal court under CAFA. Indeed, a Memorandum Opinion of federal District Court Judge Mary Cooper of the District of New Jersey, in *Harvey v. Blockbuster, Inc.*,<sup>17</sup> issued shortly after the AMC hearing on *Illinois Brick*, quotes extensively from the Senate floor debate and endorses this view.

Nevertheless, the beneficial *parens patriae* provisions of the Hart-Scott-Rodino Act make the federal courts an attractive forum for multistate downstream purchaser cases, even though the downstream purchasers currently must recover, if at all, pursuant to supplemental state claims.<sup>18</sup> Repealing *Illinois Brick* to provide a federal remedy for downstream purchasers would enhance the desirability of bringing multistate actions in federal court in the first instance.

Finally, the proposal addresses a problem that is overstated as to actions brought by states. Most *parens patriae* cases brought by the Attorneys General are multistate and filed in federal court. This Commission, therefore, should be hesitant to tamper with the authority of the

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<sup>14</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). As explained in note 13, *parens patriae* actions under federal antitrust law can be consolidated for trial by the MDL Panel and, accordingly, the effects of *Lexecon* may not extend to those *parens* actions.

<sup>15</sup> See H.R. 1038, the Multidistrict Litigation Restoration Act of 2005, which would effectively reverse *Lexecon*. H.R. 1038, introduced on March 2, 2005, by Rep. F. James Sensenbrenner, passed the House and was referred to the Senate Judiciary Committee.

<sup>16</sup> Testimony of Mark J. Bennett and Ellen S. Cooper *supra*, note 1.

<sup>17</sup> 384 F. Supp. 2d 749 (D. N.J. 2005) (*parens patriae* action brought under New Jersey's Consumer Fraud Act was excluded from CAFA's reach).

<sup>18</sup> These provisions include, e.g., the option to prove damages in the aggregate. 15 U.S.C. §15d.

state Attorneys General to bring actions for violations of state laws on behalf of state citizens in state courts.

**c. Structured Proceedings.**

The Commission asks whether it should recommend that Congress structurally separate antitrust proceedings into three phases: (1) liability; (2) damages; and (3) allocation of damages. We generally support this proposal because it promotes efficiency, and removes defendants from damages allocation. The proposal is similar to the 2001 report of the ABA Antitrust Section’s Task Force on the Federal Antitrust Agencies<sup>19</sup> that other noted commentators have supported.<sup>20</sup>

Nevertheless, we have several concerns with the implementation of the proposal, particularly regarding the interplay between the structural proposal and the Commission’s statement that it intends to recommend “repeal” of *Hanover Shoe*.

As noted earlier, *Hanover Shoe* prevents antitrust defendants from arguing pass-on as a defense to liability or damages.<sup>21</sup> Its holding is based in part on the concern that courts are unsuited to allocate damages among direct and indirect purchasers.<sup>22</sup>

The Commission’s structural proposal calls for judicial allocation of damages. The effect of this facet of the structural proposal is that it eliminates this justification for the *Hanover Shoe*

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<sup>19</sup> ABA Section of Antitrust Law, *The State and Federal Antitrust Enforcement*, Report of the Task Force on the Federal Antitrust Agencies (2001), at 24.

<sup>20</sup> See Prepared Statement of Michael L. Denger Before the Antitrust Modernization Commission Hearing Panel on “State Indirect Purchaser Actions: Proposals for Reform” June 27, 2005 Washington D.C.; Before the Antitrust Modernization Commission Panel II: “State Indirect Purchaser Actions: Proposals for Reform” Federal Trade Commission, Washington D.C., June 27, 2005, Prepared Remarks of Professor Andrew I. Gavil. See also transcript of Antitrust Modernization Commission Public Hearing, June 27, 2005, at 182-86.

<sup>21</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

<sup>22</sup> *Id.*

rule. Accordingly, while the Commission's proposal provides for allocation of damages, which is inconsistent with *Hanover Shoe*, it also keeps the pass-on argument out of the defendants hands, which is consistent with *Hanover Shoe*. If the Commission adopts this proposal, it should clarify that the change is a modification of *Hanover Shoe*, not a repeal.

The Commission's proposal also changes the structure of an antitrust case, expressly providing for allocation of damages in a new and separate phase of the litigation, in which defendants will not participate. Thus, pass-on under that proposal is not an issue for defendants.

Some might nonetheless urge that antitrust defendants should be permitted to argue pass-on to limit damages in cases where fewer than all potential plaintiffs are present. This would prevent plaintiffs from waiting until a favorable settlement or judgment to file suit<sup>23</sup> in order to garner additional damages from defendants. We disagree.

The pass-on defense is not necessary to avoid this scenario. Damages in an initial antitrust action will be determined according to the evidence of damages presented by plaintiffs in that action. If an absent class of plaintiffs feels it is entitled to damages above the amount recovered in the first action, it should be entitled to seek recovery of those damages. If that occurs, the antitrust defendant should be permitted in the second action to offset any damages paid in the first action that properly were allocable to the absent class. In other words, while defendants should be precluded from raising pass-on as a defense in the first action, they should not be so precluded in the second action. This should encourage all plaintiffs to file consolidated actions.

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<sup>23</sup> It is doubtful, as the dissent in *Illinois Brick* noted and as borne out by experience since then, that late-filing plaintiffs are or have ever been a significant problem for antitrust defendants. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 762-64 (1977) (Brennan, J., dissenting).

In addition, *Hanover Shoe* addressed several other significant policies. The Court was concerned with the difficulty of allocating damages. It was also concerned that permitting defendants to use pass-on as a defense would result in fewer and smaller recoveries against defendants and consequently reduce antitrust deterrence.<sup>24</sup> This concern is no less valid under the Commission's structural proposal.

Moreover, allowing defendants to argue pass-on as a defense negates the efficiency benefits of the proposal. If an antitrust defendant can raise pass-on issues in the liability or damages phase of the trial, that defendant voids the benefit of pushing that issue back to the allocation phase after issues of liability and total damages have been resolved.

Further, allowing antitrust defendants to use pass-on as a defense, while also relieving them of the burden and cost of dealing with damages allocation, is inequitable. A structural/procedural proposal should not be designed to weigh so heavily in favor of antitrust defendants.

The Commission has also asked whether its structural proposal could be implemented so that liability and damages are tried together, with damages allocation as a separate phase. We believe this is the proper approach. Currently, liability and damages are often, if not usually tried together, subject to the trial court's exercise of discretion under Fed. R. Civ. P. 42(b). Nothing in the Commission's structural proposal argues for different treatment. If anything, with the difficult issue of pass-on effectively eliminated from the determination of liability and damages, the Commission's proposal for structured proceedings provides even less justification for separate treatment than currently exists.

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<sup>24</sup> *Hanover Shoe*, 392 U.S. at 494.

Finally, calculation of damages under structured proceedings should take into consideration the judgments of individual states regarding their citizens' entitlement to relief for antitrust violations. As we have explained previously regarding preemption, states should remain free to decide for themselves the optimal level of antitrust deterrence necessary to protect their citizens.<sup>25</sup>

#### **d. Class Actions**

The Commission asks whether overruling *Hanover Shoe* would create new challenges for class certification in antitrust actions. As we have already explained, we do not believe Congress should completely “overrule” *Hanover Shoe*, especially in light of the damages allocation contemplated by the structured proceedings that the Commission is considering.

Assuming, however, that Congress chooses to permit defendants to argue pass-on as a defense to antitrust liability, we express no opinion as to the impact this would have on class certification. Because 15 U.S.C. §15c permits the state Attorneys General to bring actions as *parens patriae* on behalf of consumers, the Attorneys General have only limited experience with the practical issues surrounding class certification. We, therefore, decline to speculate on the impact that a hypothetical Congressional repeal of *Hanover Shoe* would have on those issues.

## **2. Remaining AMC proposals on civil remedies**

The Request For Comment includes three other civil remedies proposals. Proposal 2 suggests nine factors that could underlie a court's exercise of discretion to limit damages to single damages. Proposal 3 suggests that more than treble damages might be appropriate in

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<sup>25</sup> Many states, like Maryland, expressly provide for avoidance of “duplicative liability.” See Md. Comm. L. Code Ann. §11-209(b)(2). Others, like Texas, expressly provide that recoveries under federal law will be offset against recoveries under the state antitrust statute. See Tex. Bus. & Comm. Code §15.21(a)(2). *But see* Lande, *Are Antitrust “Treble” Damages Really Single Damages*, 54 Ohio St. L. J. 115 (1993).

some circumstances, as, for example, when damages will not be recovered for significant effects outside of the United States. Finally, proposal 4 suggests a change to how private antitrust actions are handled when the government institutes criminal proceedings.

These new proposals have not been the subject of prior analysis, discussion, and commentary among the states. We, therefore, provide only the following brief comments.

Pursuant to the unanimous resolution of the states in March 2005 on the Principles of State Antitrust Enforcement, the states oppose limitations on the states' antitrust authority. Both proposal 2's limitation on treble damages and proposal 4's limitations on recovery may represent a change that "limit[s] state antitrust authority."

Proposals 2 and 3 seek to alter the treble damages provision of section 4 of the Clayton Act, 15 U.S.C. § 15. To date, no case has been made to change the treble damage provision of section 4. The antitrust laws have served this nation well, and the treble damages provision of section 4 has long been significantly intertwined with how the antitrust laws operate. Any change to the treble damages provision – either increasing or decreasing the multiplier – would significantly rewrite the antitrust laws. Such a fundamental change is appropriate only if a significant problem has been identified, a focused solution to that specific problem has been proposed, and that focused solution will not have unintended consequences.<sup>26</sup> The states are not aware of any evidence presented to the AMC, or otherwise, supporting the view that the treble damage remedy represents a significant problem. Thus, proposals 2 and 3 do not appear to meet the standard for proposing a change in the antitrust laws.

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<sup>26</sup> The statute that created the Commission suggests such an analysis: "The duties of the Commission are...to examine whether the need exists to modernize the antitrust laws." Public Law 107-273 §11053(1)

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 reflects Congress's disinclination to change the treble damage provision. According to the United States Department of Justice, some companies were reluctant to participate in DOJ's amnesty program because doing so left the company exposed to treble damages in subsequent civil litigation. Congress responded to this perceived concern in a very specific way: the 2004 act makes the amnesty recipient eligible for reduced civil damage exposure provided that the recipient affords cooperation to the plaintiffs in the civil litigation.<sup>27</sup> The statute itself details the required cooperation,<sup>28</sup> and itself illustrates Congress's intention not simply to provide civil damage reduction to the amnesty recipient,<sup>29</sup> but also informational benefits to the victims of antitrust violations. Congress did not change the treble damage provision generally, and, indeed, expressly provided that the 2004 amendment expire after five years.<sup>30</sup> In other words, the 2004 amendment is limited, balanced and provisional—all of which represents a legislative recognition that the treble damage provision has well-served the nation's antitrust enforcement regime for more than 100 years.

In addition, the states note that former Assistant Attorney General R. Hewitt Pate proposed a comprehensive empirical study of the effects of antitrust enforcement. The Commission, adopting the suggestion of an ad hoc group of Commissioners, decided against

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<sup>27</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (“ACPERA”).

<sup>28</sup> The “require[d]” cooperation includes “a full account . . . of all known facts, . . . all [relevant] documents, . . . [an individual] making himself or herself available for such interviews, depositions, or testimony . . . as the claimant may reasonably require, [and an amnesty applicant's] best efforts to secure and facilitate . . . cooperating individuals.” *Id.* § 213 (b).

<sup>29</sup> The damage exposure “shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.” *Id.* The bill has no effect on monetary exposure other than damages. *Id.* § 213(d).

<sup>30</sup> *Id.* § 211.

designing or carrying out such a study.<sup>31</sup> That commission decision bolsters the states' view that the case has not been made for altering the treble damage provision of section 4.

The states similarly oppose proposal 4. In response to proposal 1, the states have already commented on some of the themes that also are present in proposal 4: using procedural means to resolve claims in one proceeding and allowing both "direct" and "indirect" purchasers to recover. Yet, proposal 4 also fundamentally rewrites much of the current procedure for evaluating the civil consequences of conduct that also elicits criminal enforcement, and appears to complicate greatly the current procedure for criminal enforcement. As with proposals 2 and 3, the fundamental changes contemplated under proposal 4 would be appropriate only if a significant problem has been identified, a focused solution to that specific problem has been proposed, and that focused solution will not have unintended consequences. Such issues require extensive study, which has yet to occur.

In addition, proposal 4 contains fundamental flaws:

(1) The proposal does not identify who would be responsible for proving "all unlawful gains," and the states expect that criminal enforcers do not want and are not trained to meet that responsibility.

(2) The 90 day period for concluding the proceedings appears to be significantly shorter than a court would generally require to evaluate the civil consequences of activities that are prosecuted criminally under the antitrust laws. Ninety days might often be too short even to ensure that all interests are identified and represented in the proceeding. Moreover, the period of

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<sup>31</sup> Transcript of March 24, 2005, meeting at pages 13-19, available at [http://amc.gov/pdf/meetings/050324\\_Meeting\\_Transcript\\_corr\\_reform.pdf](http://amc.gov/pdf/meetings/050324_Meeting_Transcript_corr_reform.pdf). The "ad hoc" committee's report is available at <http://amc.gov/pdf/meetings/empirical.pdf>.

time during which class members have notice of and an opportunity to object to a proposed settlement of an antitrust litigation is often longer than 90 days.

(3) Disregarding claims of less than \$100 is inappropriate. The states have often delivered recovery to individual consumers of less than \$100. In *In re Cardizem CD Antitrust Litigation*,<sup>32</sup> although the checks distributed to consumers averaged over \$300, many consumers received checks for as low as \$10. In *In re Compact Disc Minimum Advertised Price Antitrust Litigation*,<sup>33</sup> the states delivered checks for \$13.86 to millions of consumers. If claims are too small to allow cost efficient distribution, the case law currently requires a cy pres distribution, rather than disregarding the claims.<sup>34</sup>

(4) Limiting recovery to the actual unlawful gain whenever an acquittal results from the criminal proceeding also fundamentally rewrites the applicable law. Acquittals do not now have any collateral estoppel effect on civil proceedings because of the different standards of proof in civil and criminal proceedings. Moreover, an acquittal may, for example, result from a reason unrelated to a finding that is necessary for proving a civil monetary claim. Further, measuring damages as the unlawful gain is inappropriate for conduct serious enough to precipitate a criminal prosecution in the first instance.

Proposal 4 should not advance further in light of the serious questions and concerns posed by it, and the considerable analysis required to address these questions and concerns.

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<sup>32</sup> 332 F. 3d 896 (6th Cir. 2003).

<sup>33</sup> MDL Docket No. 1361 (D. Ct. Me).

<sup>34</sup> See generally ABA Section of Antitrust Law, State Antitrust Enforcement Handbook 215-218 (2003).

## CONCLUSION

Improvements to the procedure and efficiency of antitrust enforcement should not undermine the law's effectiveness nor fundamentally alter its purpose. While legislative repeal of *Illinois Brick* and modification of *Hanover Shoe* advance both consumer welfare and deterrence goals of antitrust, proposals to change traditional treble damage remedies and procedures subvert the core precepts of antitrust law.

Respectfully submitted,



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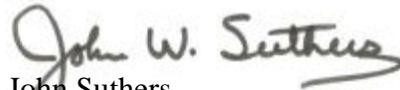
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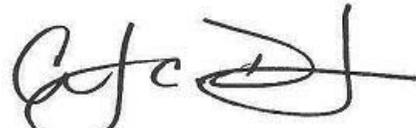
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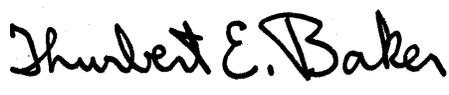
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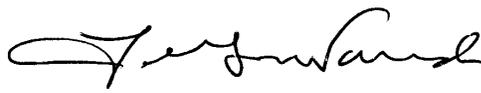


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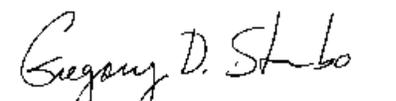
  
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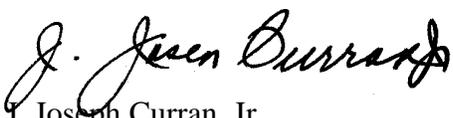
  
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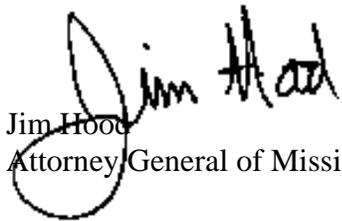
  
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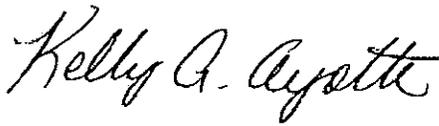
  
Mike Cox  
Attorney General of Michigan

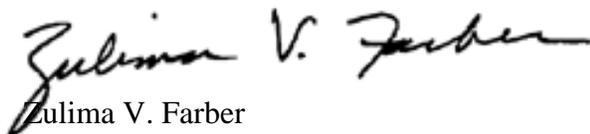
  
Mike Hatch  
Attorney General of Minnesota

  
Jim Hood  
Attorney General of Mississippi

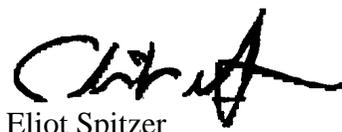
  
Jeremiah W. (Jay) Nixon  
Attorney General of Missouri

  
Mike McGrath  
Attorney General of Montana

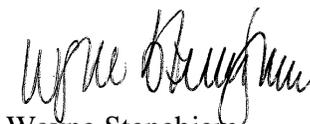
  
Kelly Ayotte  
Attorney General of New Hampshire

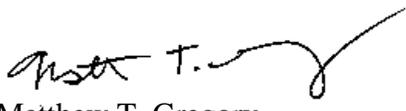
  
Zulima V. Farber  
Attorney General of New Jersey

  
Patricia Madrid  
Attorney General of New Mexico

  
Eliot Spitzer  
Attorney General of New York

  
Roy Cooper  
Attorney General of North Carolina

  
Wayne Stenehjem  
Attorney General of North Dakota

  
Matthew T. Gregory  
Attorney General of Northern Mariana  
Islands

  
Jim Petro  
Attorney General of Ohio

  
W.A. Drew Edmondson  
Attorney General of Oklahoma

  
Tom Corbett  
Attorney General of Pennsylvania

  
Roberto J. Sanchez Ramos  
Attorney General of Puerto Rico



Patrick Lynch  
Attorney General of Rhode Island



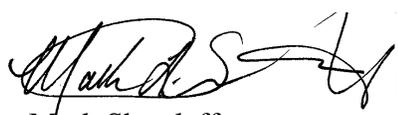
Henry McMaster  
Attorney General of South Carolina



Larry Long  
Attorney General of South Dakota



Paul G. Summers  
Attorney General of Tennessee



Mark Shurtleff  
Attorney General of Utah



William H. Sorrell  
Attorney General of Vermont



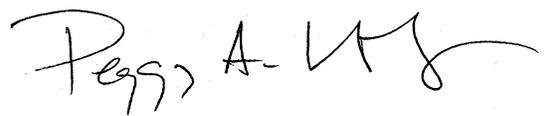
Robert McDonnell  
Attorney General of Virginia



Rob McKenna  
Attorney General of Washington



Darrell Vivian McGraw, Jr.  
Attorney General of West Virginia



Peg Lautenschlager  
Attorney General of Wisconsin